

## Class Action Defense Strategy Blog

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## **California Court of Appeal Affirms Denial of Class Certification Based On Presence of Individual Issues While Rejecting Plaintiff's Argument Based on Tobacco II**

By *Sascha Henry* and *Paul Seeley*

In In re Vioxx Class Cases, (2009) \_\_ Cal. App. 4th \_\_, the trial court denied class certification after the defendant, Merck & Co., Inc. effectively showed that the plaintiff's theory of the case was grossly simplified. By introducing copious evidence showing the numerous factors that may relate to each class member's reliance and damages, Merck avoided class certification even in the face of its allegedly pervasive and misleading advertising campaign. The plaintiffs appealed, arguing that the California Supreme Court's decision in In re Tobacco II Cases, (2009) 46 Cal. 4th 298, undermined the trial court's rationale. The Court of Appeal, Second District, affirmed the trial court's denial of class certification.

Before Merck removed it from the market, Merck advertised Vioxx as an effective pain reliever that did not cause any gastrointestinal complications. This differentiated it from the common (and cheaper) pain reliever, naproxen. After Vioxx was linked to increased cardiovascular risks, Merck pulled it from the market in 2004.

The plaintiffs in Vioxx were ordinary consumers, not patients who suffered harm from taking Vioxx. The plaintiffs filed suit, bringing causes of action for (1) unfair competition ("UCL"), (2) false advertising, (3) violations of the Consumers Legal Remedies Act ("CLRA") and (4) unjust enrichment. The plaintiffs contended that Vioxx, as a pain reliever, was no more effective (and possibly less safe due to the cardiovascular complications) than the generic pain reliever naproxen. The plaintiffs alleged that Merck misrepresented Vioxx's effectiveness and thus caused both consumers and third-party payors ("TPPs") to buy the more expensive Vioxx instead of the cheaper and equally effective naproxen. Thus, under their various causes of action, plaintiffs sought damages for the difference in price between Vioxx and naproxen.

As for the CLRA claim, the court held that individual issues predominated. The plaintiffs claimed that they could prove Merck's marketing campaign was a "common campaign of hiding

cardiovascular risks" and that the "common campaign" would allow for a class-wide presumption of consumer reliance upon Merck's campaign and the materiality of the misrepresentations to induce the class to use the expensive Vioxx rather than the cheaper naproxen. The court disagreed, pointing to Merck's evidence that Vioxx was not necessarily less safe than naproxen, particularly for those patients who already suffered gastrointestinal issues. For those patients, the alleged risk of a heart attack was outweighed by the risk of death by gastrointestinal bleeding, rendering the alleged misrepresentation immaterial to the decision to use Vioxx. Furthermore, the court held that individualized determinations went into each doctor's decision to prescribe Vioxx, rendering it impossible to adjudicate, on a class-wide basis, whether the misrepresentations were "material" or whether each Vioxx patient relied on the marketing campaign when it purchased the drug.

As for the UCL claim, the court affirmed the trial court's holding that individual issues prevented the recovery of restitution under the UCL. The plaintiffs argued that each class member's restitution amount was the difference in price between Vioxx and naproxen. The plaintiffs claimed that, since Merck's misrepresentations caused class members to pay more for Vioxx than the equally effective naproxen, the price difference was an adequate measure of damages. The court disagreed, noting that Merck's evidence showed that Vioxx could not be compared to naproxen on a class-wide basis since many individual patients and/or TPPs used Vioxx only after naproxen was shown to be ineffective, thus rendering a comparison between Vioxx and naproxen impossible without evaluating each individual circumstance. Additionally, the court held that restitution under the UCL requires the "existence of a 'measurable amount' of restitution, supported by the evidence." As naproxen could not act as a class-wide comparison to Vioxx, the trial court correctly held a UCL cause of action could not be certified.

On appeal, the plaintiffs argued that this was a legal error under Tobacco II, which held that a UCL action exists even in the absence of individualized proof of deception, reliance and injury. Nevertheless, the court found that the individual issues regarding the damages was sufficient to defeat class certification of the UCL claim, regardless of Tobacco II.